2011 IL App (1st) 100185-U

SIXTH DIVISION
September 30, 2011

No. 1-10-0185

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 4201
	)	
MICALE MARSHALL,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Cahill and Garcia concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant was not denied a fair trial by the State's argument that he sold "poison" in a neighborhood with a school or its characterization of the defense theory at trial as a conspiracy. As defendant was sentenced as a Class X offender, he was subject to both an enhanced prison term and an enhanced term of Mandatory Supervised Release; defendant's mittimus must be corrected to reflect the offense of which he was convicted.

¶ 2 After a jury trial, defendant Micale Marshall was convicted of the possession of a controlled substance with intent to deliver and sentenced, based on his criminal history, to a Class X term of six years in prison. On appeal, defendant contends that he was denied a fair trial

because the State made certain comments which were intended to inflame the jury against him. He further contends that his term of Mandatory Supervised Release (MSR) should be that of a Class 1 felony, *i.e.*, two years, instead of the three-year term that accompanies a Class X felony because although sentenced as a Class X offender he was only convicted of a Class 1 felony. Defendant finally requests that his mittimus be corrected to reflect that he was convicted of the possession of a controlled substance with intent to deliver. We affirm and correct the mittimus.

¶ 3 Defendant was arrested in January 2009 and subsequently charged by information with the possession of a controlled substance with intent to deliver within 1,000 feet of a school and possession of a controlled substance with intent to deliver. Prior to trial, the State nol-prossed the first count.

¶ 4 During opening statements, the State argued that defendant worked in sales in a neighborhood with an elementary school, but that he did not sell anything useful.

> "What the defendant sells is poison. He sells poison; the kind of poison that ruins people's lives, the kind of poison that makes people do things they otherwise wouldn't do, a poison that makes people do things that they wouldn't ordinarily do, the kind of poison that slowly leads to one's demise and the demise of the people around that person."

¶ 5 The State then asserted that after hearing all of the evidence the jury would know that defendant was guilty of selling drugs "in the neighborhood of a school in broad daylight." The defense responded that defendant was in his friend's car when he was arrested, and that there were no videos, photos, or recordings of defendant engaged in the sale of drugs.

¶ 6 Chicago police officer Jason Acevedo testified that he was conducting surveillance in a neighborhood containing an elementary school when he observed defendant sitting in the

passenger seat of a silver Cadillac. The car was being driven by Larry Prescott. As Acevedo watched, defendant would wave or try to get the attention of passers-by. Once defendant had an individual's attention, the car would pull over to the curb and the person would walk up to the passenger side of the vehicle. Then the person would give defendant money in exchange for a "small item." Acevedo watched five such exchanges during a 40-45 minute period. After the fifth exchange, Acevedo notified other officers of the car's description and location.

¶ 7 Officer Bocanegra testified that the window was down as he approached the passenger side of the Cadillac. As he announced his office, he observed defendant move slightly to the left and discard something toward the floor. Tin foil packets, which Bocanegra characterized as a common packaging for heroin, were on the doorjamb when the car door was opened. Defendant was ordered to exit the vehicle and was taken into custody. Bocanegra recovered 10 packets. These items were subsequently inventoried.

¶ 8 Forensic chemist Cotelia Fulcher testified that the contents of the 10 tin foil packets weighed 1.247 grams and tested positive for the presence of heroin.

¶ 9 Defendant testified that his friend Larry gave him a ride so that he could run errands related to leasing an apartment. At one point, Larry stayed in the car while defendant went into a currency exchange. When defendant returned to the car, a woman he did not know was in the backseat. After he got into the car, he then heard screeching tires, and saw police cars "blocking us off." Defendant, Larry, and the woman were subsequently removed from the car. He denied having any drugs, seeing any drugs in Larry's car, or handing things to pedestrians from the car.

¶ 10 During cross-examination, the State asked defendant two questions regarding an elementary school in the neighborhood where he was arrested. In both instances, defense counsel objected, and the court sustained the objection.

¶ 11 In its closing argument, the State reviewed the elements of the offense of possession with intent to deliver, and explained how the testimony of the officers and Fulcher established each element. The State then contended that it was the jury's duty to judge credibility and that the officers did not know defendant and had no reason to "jam" defendant up considering that the car belonged to Larry.

¶ 12 The defense responded by arguing that no narcotics were recovered from defendant. The defense further argued that it was unbelievable that defendant would sit with 10 packets of heroin in his hand and then just drop them to the floor when officers arrived. The defense also highlighted that none of the alleged five buyers was arrested, and the only "evidence" of these individuals was Acevedo's testimony. The defense finally argued that Bocanegra's testimony that defendant threw down the packets was uncorroborated.

¶ 13 In rebuttal, the State contended that defendant's theory of the case was that police officers who were complete strangers to defendant decided to "put" a case on him. The State characterized defendant's "conspiracy" theory as audacious because there was no reason that the police "would be out to get" him.

¶ 14 When instructing the jury, the court told the jurors that "[n]either opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be discarded." See Illinois Pattern Jury Instruction, Criminal, No. 1.03 (4th 2003). The court also instructed the jury to disregard questions to which objections were sustained.

¶ 15 The jury convicted defendant of the possession of a controlled substance with intent to deliver. Defendant filed a motion for a new trial alleging, *inter alia,* that the State made inflammatory statements in closing argument designed to arouse the passions of the jury. After the trial court denied the motion for a new trial, it sentenced defendant, as a Class X offender, to

six years in prison. Defendant's mittimus indicates that he was convicted of the Class X felony of "MFG/DEL HERION/SCH/PUB HS/PK."

¶ 16 On appeal, defendant contends that the State improperly attempted to inflame the jury's passion by asserting that defendant sold "poison" and highlighting that he was arrested in a neighborhood that contained a school. Defendant further contends that the State improperly shifted the burden of proof during closing argument by arguing that the defense's theory at trial was that the State's witnesses conspired to frame defendant.

¶ 17 Before reaching the merits of defendant's argument, we must address the State's contention that these claims are subject to forfeiture because defendant failed to object at trial and to raise this issue in his posttrial motion. See, *e.g., People v. Enoch,* 122 Ill. 2d 176, 186 (1988).

¶ 18 Defendant acknowledges this forfeiture, but requests this court review his claim for plain error. See *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005) (forfeited errors may be addressed "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence"). In the alternative, he contends that his trial counsel was ineffective for failing to object to most of these comments and include them in a posttrial motion.

¶ 19 The first step in determining whether the plain error doctrine applies is to determine whether any error occurred. *People v. Patterson*, 217 Ill. 2d 407, 444 (2005). Absent error, there can be no plain error. *People v. Williams*, 193 Ill. 2d 306, 349 (2000).

¶ 20 Defendant contends that it was "disingenuous and misleading" to refer to heroin as poison and that there was no reason to reference the school because the State nol-prossed the count charging defendant with the possession of a controlled substance with intent to deliver within 1,000 feet of a school.

¶ 21 During opening statements, the State explained that the evidence at trial would show that defendant sold "poison." See *People v. Kliner*, 185 Ill. 2d 81, 127 (1998) (opening statements inform the jury what each side thinks that the evidence will establish). Specifically, defendant sold narcotics in broad daylight in a neighborhood that contained a school. Although defendant asserts that the repeated use of the word "poison" to describe heroin inflamed the jury against him, he identifies no authority finding such a characterization to be improper. In fact, this court has previously held that the State is permitted to argue against the "evils" of drug abuse and for the need to punish drug dealers. See *People v. Reid,* 272 Ill. App. 3d 301, 310 (1995) (the State may sound the call for victory in the war on drugs). The State's comments on the negative effects of heroin upon its users were not improper.

¶ 22 During opening statements, the school was mentioned as one of the details explaining defendant's "sales" job. *Kliner*, 185 Ill. 2d at 127 (1998) (opening statements may include an explanation of the evidence to be presented and the reasonable inferences to be to be drawn from that evidence). Defendant does not dispute that he was arrested in a neighborhood containing an elementary school. Although defense counsel did not object to the question about the school posed to Acevedo, the trial court sustained counsel's objections when similar questions were posed to defendant. See *People v. Johnson*, 208 Ill. 2d 53, 116 (2003) (the potential prejudice associated with improper remarks by a prosecutor is usually cured by "the prompt sustaining of an objection combined with proper jury instruction"). However, even were this court to assume, without deciding, that the references to the school were improper in light of the State's nol-prossing of the count charging defendant with committing the offense within 1,000 feet of a school, defendant cannot show how he was prejudiced by these comments. See *People v. Naylor*, 229 Ill. 2d 584, 593 (2008) (defendant bears the burden of persuasion under both prongs of the plain error doctrine).

¶ 23 In order to prevail on this claim under the first prong of the plain error doctrine, defendant must establish that the alleged error alone, that is counsel's failure to object to the mention of the school during opening argument and Acevedo's testimony, could have led to his conviction. In other words, to succeed on his claim, defendant must establish that the verdict "may have resulted from the error and not the evidence" at trial. *Herron*, 215 Ill. 2d at 178. Defendant has not met this burden, as it is clear in this case having reviewed the record that he cannot show prejudice. Although defendant testified that he did not possess any narcotics, the testimony of the State's witnesses established that defendant was observed making exchanges with passers-by and then dropping tin foil packets which tested positive for the presence of heroin. As defendant cannot establish that it was the three mentions of the elementary school, in and of themselves, that resulted in his conviction he cannot establish plain error. See *Naylor*, 229 Ill. 2d at 593.

¶ 24 Defendant next contends that the State improperly shifted the burden of proof when it accused the defense of alleging a conspiracy by the State's witnesses.

¶ 25 Prosecutors are given wide latitude when making closing arguments and the State's arguments will lead to reversal only when "the improper remarks constituted a material factor in a defendant's conviction." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Closing arguments "must be viewed in their entirety" and the complained of remarks put in context. *Wheeler*, 226 Ill. 2d at 122. The State may comment on the evidence presented and draw reasonable inferences from that evidence. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005); see also *Kliner*, 185 Ill. 2d at 154 (during rebuttal, the State is entitled to respond to comments made by the defendant which invite a response). When analyzing allegedly improper closing remarks for plain error, our supreme court has held that a defendant bears the burden of persuading the reviewing court that the verdict would have been different absent the complained of remarks. *People v. Johnson*, 218 Ill. 2d 125, 142-43 (2005).

¶ 26 Although the appropriate standard of review for closing arguments is unclear, this court need not resolve that issue, as our holding here would be the same under either standard. See *People v. Hammonds*, No. 1-08-0194, slip op. at 51-54 (May 6, 2011) (discussing the "apparent conflict" between our supreme court's decisions in *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) (applying a *de novo* standard) and *People v. Blue*, 189 Ill. 2d 99, 128, 132 (2000) (applying an abuse of discretion standard), and the resulting division between appellate courts as to the proper standard of review).

¶ 27 At trial, the defense conceded defendant's presence in a car from which narcotics were recovered, but asserted that there was no evidence that he actually possessed or even saw those narcotics, as it was his friend's car and an unidentified woman had entered the car while defendant was in a currency exchange. The defense also questioned the officers regarding their "uncorroborated" testimony because there were no videos or other recordings of the events. The State responded to this defense theory by arguing that if one accepted this version of events, the only explanation for defendant's arrest was that the officers agreed to "put" the case on defendant. The State further argued that this theory was incredible because it would have been far easier to put the case on the owner of the car.

¶ 28 This court has previously determined that in addition to responding to comments by defense counsel which invoke a response, the State may properly highlight the inconsistences in a defendant's argument and denounce the defendant's activities. *People v. Garcia*, 407 Ill. App. 3d 195, 206 (2010) (the State called defendant's argument ridiculous and insulting). Here, rather than shifting the burden of proof, the State was commenting on the incredible nature of defendant's theory and attacking defendant's credibility. See *People v Gray*, 252 Ill. App. 3d 362, 368 (1993) (the State characterized defendant's theory of the case as "so ridiculous" that it was not worth commenting on). Viewing these remarks within the context of the entirety of closing

argument, these comments do not fall outside the wide latitude given to the State during closing argument. See *Wheeler*, 226 Ill. 2d at 122-23. Because none of these remarks were improper, there can be no plain error (*Williams*, 193 Ill. 2d at 349), and defendant's argument must fail.

¶ 29 Defendant finally contends that he was denied effective assistance because trial counsel did not object to the complained of remarks.

¶ 30 To show an attorney's representation was ineffective, a defendant must establish (1) the attorney's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant. *Strickland V. Washington*, 466 U.S. 668, 687 (1984). When determining whether an attorney's performance was unreasonable, a reviewing court must indulge in a strong presumption that trial counsel's actions fell within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the complained of action could be considered sound trial strategy. *Strickland*, 466 U.S. at 689. A defendant shows prejudice by showing a reasonable probability, *i.e.,* a probability sufficient to undermine confidence in the outcome of the proceeding, that but for counsel's errors, the proceeding would have resulted in a different outcome. *Strickland*, 466 U.S. at 694. As failure to satisfy either prong of the *Strickland* test defeats a claim of ineffective assistance, a court does not have to determine whether counsel's performance was deficient before examining the prejudice a defendant suffered because of counsel's alleged errors. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001).

¶ 31 As discussed above, the State's comments during opening statement and closing argument were not improper. Even if this court were to assume that the references to the school were improper, defendant cannot establish how he was prejudiced by counsel's failure to object when the evidence established that defendant conducted five exchanges of small objects for money and was observed dropping 10 foil packets that contained heroin. See *People v. Bew*, 228 Ill. 2d 122,

135 (2008) (*Strickland* requires a defendant to show actual prejudice in order to succeed on an ineffective assistance claim, rather than mere speculation). As defendant cannot establish how he was prejudiced by counsel's alleged errors, his claim of ineffective assistance must fail. See *Edwards*, 195 Ill. 2d at 163 (absent prejudice, there is no basis to find ineffective assistance).

¶ 32 Defendant's next contention is the trial court improperly imposed the three-year term of MSR that accompanies a Class X felony upon him because he was convicted of a Class 1 felony.

¶ 33 Section 5-5-3(c)(8) of the Unified Code of Corrections provides that a defendant, over the age of 21, who is convicted of a Class 1 or Class 2 felony must be sentenced as a Class X offender if he has prior convictions for two Class 2 or higher class felonies arising out of a different series of acts. 730 ILCS 5/5-5-3(c)(8) (West 2008). The MSR term attached to a Class X sentence is three years. 730 ILCS 5/5-8-1(d)(1) (West 2008).

¶ 34 This court has previously held that when Class X treatment is accorded to a defendant, the MSR term applicable to such a sentence is automatically imposed (*People v. Anderson*, 272 Ill. App. 3d 537, 541 (1995)), *i.e.*, a Class X offender receives both an enhanced prison term and an enhanced MSR term (*People v. Smart*, 311 Ill. App. 3d 415, 417-18 (2000)). See also *People v. Watkins*, 387 Ill. App. 3d 764, 767 (2009).

¶ 35 Defendant acknowledges that *Anderson, Smart,* and *Watkins* reached a result contrary to his argument, but argues they were wrongly decided in light of our supreme court's decision in *People v. Pullen*, 192 Ill. 2d 36 (2000). However, this court's recent decisions in *People v. McKinney*, 399 Ill. App. 3d 77, 82-83 (2010), and *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (2010), considered, and rejected, similar arguments. Thus, we continue to adhere to this court's decision in *Anderson*.

¶ 36 Here, defendant was convicted of the Class 1 offense of possession of a controlled substance with intent to deliver (720 ILCS 570/401(c) (West 2008)), and, based on his previous

convictions, was sentenced as a Class X offender pursuant to section 5-5-3(c)(8) of the Unified Code of Corrections (730 ILCS 5/5-5-3(c)(8) (West 2008)). Accordingly, as defendant was sentenced as a Class X offender pursuant to section 5-5-3(c)(8), he received both an enhanced term of imprisonment and an enhanced MSR term (see *Smart*, 311 Ill. App. 3d at 417-18), and is properly required to serve a three-year term of MSR upon his release from prison.

¶ 37 Defendant finally contends, and the State concedes, that his mittimus must be corrected to reflect that he was convicted of the Class 1 offense of the possession of a controlled substance with intent to deliver (see 720 ILCS 570/401(c) (West 2008)), rather than the manufacture and delivery of a controlled substance within 1,000 feet of a school. Accordingly, pursuant to our power to correct a mittimus without remand (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), we direct the circuit court clerk to correct the mittimus to reflect that defendant was convicted of the possession of a controlled substance with intent to deliver.

¶ 38 Accordingly, the judgment of the circuit court is affirmed. Pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we order the mittimus be corrected to reflect that defendant was convicted of the Class 1 offense of the possession of a controlled substance with intent to deliver.

¶ 39 Affirmed; mittimus corrected.